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In The

Supreme Court of the United States

October Term, 1968

No. 237

NICHOLAS ANGELERI,

Petitioner,

- v -

STATE OF NEW JERSEY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

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To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Nicholas Angeleri, respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of New Jersey entered on April 1, 1968 which judgment affirmed a judgment of conviction and sentence of the Somerset County Court entered on September 29, 1967.

Citation to Opinion Below

The opinion of the Supreme Court of New Jersey, printed in Appendix B hereof, is reported in 51 N.J. 382, 241 A.2d 3 (1968).

Jurisdiction

The judgment of the Supreme Court of New Jersey was entered on April 1, 1968. By order of May 28, 1968 the issuance of the mandate on affirmance was stayed pending the filing, within 30 days thereof, of this petition for writ of certiorari. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257 (3) since petitioner's rights under the Fifth and Fourteenth Amendments to the Constitution of the United States are drawn in question.

Questions Presented

1. Whether the New Jersey Rule of Court requiring a defendant who wishes to rely on the defense of alibi to supply to the prosecution, on demand, a signed bill of particulars giving the places where the defendant claims to have been at the time of the offense and the names and addresses of the witnesses who will be called to establish such alibi, violated petitioner's rights under the Fifth and Fourteenth Amendments?

CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provisions involved are the Fifth and Fourteenth Amendments to the United States Constitution, which are printed in Appendix A hereto.

Statement of the Case

The petitioner was indicted by a Somerset County Grand Jury and charged with four counts of carnal abuse, in violation of N.J.S. 2A:138-1 and one count of impairing the morals of a girl 12 years of age, in violation of N.J.S. 2A:96-3 (D1a-2a).*

Prior to trial the State served upon the defense a Demand for Bill of Particulars as to alibi pursuant to Rules Governing the New Jersey Courts, R.R. 3:5-9 (Appendix D, infra). The petitioner moved to vacate this demand on the ground that it violated his rights under the United States Constitution (Appendix D, infra). The trial court denied this motion and interlocutory leave to appeal sought from the Appellate Division of the Superior Court and from the Supreme Court of New Jersey was denied. Subsequently the petitioner supplied a bill of particulars as to alibi giving, as required, the names and addresses of those persons (four in number) upon whom he would rely to establish his presence away from the scene of the crime (Appendix D, infra).

At trial the complaining witness testified that the petitioner had intercourse with her on four different days and that on another day he had engaged her in immoral conduct. The petitioner did not testify in his own defense but did produce as witnesses three of the persons whose names

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* References are to petitioner's appendix in the Supreme Court of New Jersey which has been certified and filed as part of the official record in this Court.

had been previously supplied to the prosecution in response to the Bill of Particulars as to Alibi. Two of these witnesses, a physician and an accountant, testified that petitioner was elsewhere on two of the occasions testified to by the complaining witness (D65a-108a; D110a-112a). Both of these witnesses had been interviewed prior to trial by a county prosecutor's detective (D70a, 111a-112a), and one of them, petitioner's accountant, was served by the State with a subpoena to bring various records of his financial dealings with petitioner to court with him (D65a-67a). The witness was cross-examined extensively based upon these records (D71a-94a).

Petitioner was convicted and on September 29, 1967 was sentenced to a term of not less than two nor more than three years in the New Jersey State Prison, on each count, the terms to run concurrently. Petitioner appealed to the Appellate Division of the Superior Court, claiming that the rule as to the bill of particulars as to alibi, violated his rights under the Fifth and Fourteenth Amendments to the United States Constitution. The Supreme Court of New Jersey certified the appeal on its motion prior to its having been argued in the Appellate Division. On April 1, 1968 the Supreme Court handed down its decision holding that the Rule was not unconstitutional. The Supreme Court of New Jersey granted petitioner's motion to stay its mandate and continue petitioner on bail pending the filing of, and determination upon, this petition for a Writ of Certiorari.

Reasons for Granting the Writ

1. Rule 3:5-9 of the Rules Governing the New Jersey Courts (1968) provides that a defendant who intends to rely on the defense of alibi must supply, on demand of the prosecutor, a written bill of particulars setting forth the place or places where the defendant claims to have been at the time of the alleged offense and the names and addresses of the witnesses upon whom the defendant intends to rely to establish such alibi. Upon receiving these particulars the prosecuting attorney must furnish the defendant with the names and addresses of the witnesses upon whom the state intends to rely to establish the defendant's presence at the scene of the offense. If the defendant fails to provide the demanded particulars he may be excluded from presenting alibi evidence (Appendix A, infra).

Thirteen states, in addition to New Jersey, have statutes or rules requiring a defendant to provide the prosecution with advance notice of an alibi defense.[1] Six of these states additionally require, as does New Jersey, that the names and addresses of proposed alibi witnesses be supplied to the prosecution on demand.[2] In every instance

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1. Ind. Ann. Stat. Section 9-1631 to 1633 (1956); Iowa Code Section 777.18 (1958); Kan. Gen. Stat. Ann. Section 62, 1341 (1949); Mich. Stat. Ann. Section 28. 1043 to 1044 (1948); Minn. Stat. Section 630.14 (1947); N.Y. Code Crim. Proc. Section 295-1; Ohio Rev. Code Ann. Section 2945, 58; Okla. Stat. tit. 22, Section 585 (1951); S.D. Code Section 34. 2801 (1939); Utah Code Ann. Section 77-12-17; Vt. Stat. Ann. tit. 13, Section 6561-62. (1958); Wis. Stat. Section 955.97 (1951); Ariz. Rules Crim. Proc. 192B.

2. Arizona, Iowa, Kansas, Michigan, New York and Wisconsin.

in which these statutes have been challenged the state courts have, with little or no discussion, found them to be constitutional. See the cases collected in State v. Angeleri, 51 N.J. 382, 241 A.2d 3 (1968) (Appendix B, infra). This Court has never undertaken to review the constitutionality of these statutes on the merits and, indeed, has never reviewed the validity of any prosecution discovery against a criminal defendant since the landmark decision in Boyd v. United States, 116 U.S. 616 (1886). In that case a prosecution subpoena directing the defendant to produce certain incriminating papers in court was found to violate the Fourth and Fifth Amendments. In view of the increasing concern today with criminal discovery and in light of Malloy v. Hogan, 378 U.S. 1 (1964), which made the Fifth Amendment's self-incrimination clause binding upon the states through the Fourteenth Amendment, review should be granted in this case.

A vast amount of critical commentary has been directed at the constitutionality of prosecution discovery against a criminal defendant. Many of these articles have dealt not with the alibi statutes directly but with a state court decision which relied upon the alibi statutes as support for granting the prosecution discovery of doctor's names, medical reports and x-rays relating to a rape defendant's claimed defense of impotence. Jones v. Superior Court of Nevada County, 58 Cal. 2d 56, 22 Cal. Rptr. 879, 372 P.2d 919 (Sup. Ct. 1963). Two judges dissented in that case, commenting,

> "The majority opinion does not merely enlarge a simple judicial principle of pretrial

procedure, it fundamentally alters our concepts of the rights of the accused and forces him to come forward with information before the prosecution has presented a case against him."

Many of the commentators have voiced criticism over the Jones' decision and have questioned its constitutionality. See Louisell, Criminal Discovery and Self-Incrimination: Roger Traynor Confronts the Dilemma, 53 Calif. L. Rev. 89 (1965); Schultz, Criminal Discovery by the Prosecution: Frontier Developments and Some Proposals for the Future, 22 N.Y.U. Intra. L. Rev. 268 (1967); Wilder, Prosecution Discovery and the Privilege against Self-Incrimination, 6 Am. Cr. L.Q. 3 (1968); Comment, The Self-Incrimination Privilege: Barrier to Criminal Discovery, 51 Calif. L. Rev. 135 (1963). Notes; 63 Columbia L. Rev. 361 (1963); 15 Stanford L. Rev. 700, 49 Iowa L. Rev. 176 (1963); 20 Wash. & Lee L. Rev. 159 (1963); but See Notes, 35 U. of Colo. L. Rev. 290 (1963); 8 Vill. L. Rev. 110, 61 Mich. L. Rev. 987 (1962); 76 Harv. L. Rev. 838 (1963). As noted by Professor Louisell, supra at 98-99, if the "defendant's historic immunity from the need to 'show his hand'" is "an inherent part of the privilege against self-incrimination" then the Jones' decision constituted an encroachment upon the privilege.

The federal experience in prosecution discovery has also indicated the serious constitutional questions involved. An alibi rule was proposed in one of 1944 drafts of the Federal Rules of Criminal Procedure but was not adopted at that time. See Stewart, Comments on the Federal Rules of Criminal Procedure, 8 John Marshall L. Q. 296 (1943);

Dession, The New Federal Rules of Criminal Procedure II, 56 Yale L.J. 197, 215 (1947); Note 60 Yale L.J. 626, 632 (1951). The 1966 revision of the Federal Rules of Criminal Procedure enacted, in Rule 16(c), a provision for limited discovery by the government of tangible items which a defendant intends to produce at trial. This provision is much more restrictive than the alibi statutes since it only comes into operation after a defendant has been afforded similar discovery. Thus, the defendant can, in some measure, control the discovery against himself while in the New Jersey alibi rule it is the prosecutor who may, initially, demand the information from the defendant. In dissenting from the adoption of Rule 16, Mr. Justice Douglas took note of the "current controversy among judges, prosecutors, defense lawyers and other legal commentators" concerning the "extent to which a court may compel the defendant to disclose information or evidence pertaining to his case" in light of the pribilege against self-incrimination. 15 L. Ed. 2d xcviii. Mr. Justice Douglas noted that "a serious constitutional question lurks" in this area. Mr. Justice Black also dissented, agreeing with Mr. Justice Douglas that "some of the proposed criminal rules go to the very borderline if they do not actually transgress the constitutional right of a defendant not to be compelled to be a witness against himself" 15 L. Ed.2d lxxvi, As noted, the alibi rule goes even further than Rule 16(c) in forcing a criminal defendant to provide evidence which may aid in his conviction.

There can be no doubt, of course, of the compulsion inherent in the rule. The trial court has the power to exclude the defense from presenting alibi witnesses if the prosecution demand is not

complied with. No defendant could be so foolhardy as to risk not providing the demanded information in the vain hope that a trial judge would permit the testimony notwithstanding. The gravity of the potential consequences compel a defendant to comply with the demand. As this Court said in Schmerber v. California, 384 U.S. 757, 763-64 (1966),

> "It is clear that the protection of the privilege reaches an accused's communications, whatever form they might take, and the compulsion of responses which are also communications, for example, compliance with a subpoena to produce one's papers. Boyd v. United States, 116 U.S. 616, 29 L. Ed. 746, 6 S. Ct. 524."

Some of the cases upholding alibi statutes have argued that the evidence provided absolves the defendant rather than incriminates him. One commentator has called this assumption "specious" since the witness may harm other aspects of the defense case or may place the defendant near the scene of some other crime. "Before trial it would be impossible to assess fully the risks and advantages involved in exposing such a witness to the prosecutor." Note, 16 Stanford L. Rev., supra at 702-703; Wilder, supra at 17. Furthermore, the demand incriminates because the privilege against self-incrimination has been interpreted to afford a defendant complete silence until a prima facie case against him is made out. Id. See also Schultz, supra at 270. Another commentator has suggested that the right of the defendant to remain silent until the case against him is presented is rooted more in "due process notions of fundamental fairness" than in the Fifth

Amendment. Note, 76 Harv. L. Rev., supra at 840. Others have also suggested that prosecution discovery is basically unfair since it adds to the already overwhelming balance of advantage held by the prosecution in criminal cases. It has been noted that questioning of defense witnesses by the prosecution may result in intimidation of these witnesses. Stewart, supra; Note, 76 Harv. L. Rev., supra at 840. Thus, the imbalance already inherent in the criminal process is further aggravated by permitting this type of discovery to the prosecution. Such a tipping of the scales, it is urged, constitutes a denial of due process of law.

There can be no question that this Court has placed the highest value upon the privilege against self-incrimination. In Miranda v. Arizona, 384 U.S. 436, 460 (1966), Mr. Chief Justice Warren called the privilege "the essential mainstay of our adversary system." In recent years this Court has been zealous to protect the privilege and to strike down any procedure which "cuts down on the privilege by making its assertion costly." Griffin v. California, 380 U.S. 609 (1965). The alibi rule herein does just that. A defendant who wishes to remain silent, as the privilege allows him to do, must do so at the cost of forfeiting his right to present witnesses in his own behalf. As this Court noted recently, when one constitutional right must be waived in order to assert another "an undeniable tension is created." Simmons v. United States, ___ U.S. ___, 19 L. Ed. 2d 1247, 1259 (1968). In Nieves v. United States, 280 F. Supp. 994, 1002 (S.D.N.Y. 1968), a three judge court had this to say:

> "We doubt that erosion of a defendant's fundamental rights in criminal proceedings can be sanctioned under the rubric of a balancing test. Indeed, we believe that the Supreme Court in Garrity and Griffin laid that theory to rest. Whether the Constitution denominates the protection as a right or a privilege, legislatures by means of threat of penalty or promise of reward cannot punish a defendant for exercising his constitutional protections or pressure him into waiving them."

Discovery rights for the prosecution, in the form of an alibi rule or otherwise, seem to run counter to the policies which lie at the heart of the privilege against self-incrimination. As such, one commentator has remarked that "the alibi pleading requirements would appear to be a ripe source for adjudication on constitutional grounds." Schultz, supra at 270. As noted previously, many judges and commentators have questioned the constitutionality of these procedures which are prevelant in fourteen of our states and, in a different and more limited way, in Rule 16(c) of the Federal Rules of Criminal Procedure. Since the federal standard is now applicable to the states due to Malloy v. Hogan, supra, the "wide variations from jurisdiction to jurisdiction in applying the privilege "should now yield" to a more "consistent application." Wilder, supra at 14, 23. Thus, it is submitted that the decision of the court below in upholding the constitutionality of the New Jersey alibi rule did so in a manner not consistent with prior decision of this court concerning the extent and nature of the privilege against self-incrimination. In addition, the de-

cision below deals with an area not heretofore entered by this Court but which should be in order to resolve the pressing and persistent problems raised by the efforts of prosecutors to obtain discovery from defendants in state criminal cases.

Conclusion

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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